88-1640

No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHIGAN CITIZENS
FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,

v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Does this Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), require a reviewing court to defer to an administrative agency's expansive construction of an exemption from the antitrust laws, even if the court concludes that the agency's construction is at odds with the established rule that antitrust exemptions must be narrowly construed?

2. In determining whether two newspapers that are competitive equals qualify for an antitrust exemption under the Newspaper Preservation Act, which requires that one of them be in "probable danger of financial failure," may the Attorney General approve the application on the basis of a construction of the Act that requires only (a) a showing that both papers have lost money for several years, and (b) a representation by the "non-failing" paper that it will not raise its prices even if the exemption is denied?

PARTIES TO THIS PROCEEDING

Petitioners Michigan Citizens for an Independent Press, Public Citizen, Senator John F. Kelly, W. Edward Wendover, David A. Kersh, William B. Cowan, Matthew Beer, and Murray Greenhalge, Jr., appeared as plaintiffs-appellants below. In addition, Robert G. Tesmar appeared as a plaintiff in the district court.

Respondents United States Attorney General Richard Thornburgh, Detroit Free Press (owned by Knight-Ridder, Inc.) and The Detroit News (owned by Gannett Co.) appeared as defendants-appellees below.

In addition, the American Newspaper Publishers Association and Little Rock Newspapers, Inc., appeared as *amici curiae* in the court of appeals.

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OPINIONS BELOW

The majority and dissenting opinions of the panel, the judgment of the panel, and the opinions concurring and dissenting in the court of appeals' order denying rehearing *en banc* are not yet reported, but appear in the separately bound appendix at Pet. App. 164a-211a. The opinion of the district court is reported at 695 F. Supp. 1216 and also appears at Pet. App. 149a-163a. The Decision and Order of the Attorney General, which is not reported, appears at Pet. App. 136a-147a. In addition, the Recommended Decision of the Administrative Law Judge appears at Pet. App. 1a.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1989, and the order denying rehearing *en banc* was entered on February 24, 1989 (Pet. App. 164a, 199a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The Newspaper Preservation Act, 15 U.S.C. §§ 1801, *et seq.*, provides in pertinent part:

> *Section 1802(5):* The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.
>
> *Section 1803:* (a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew or amend any joint operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication . . ..
>
> (b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.
>
> (c) Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

The Department of Justice's regulations pertaining to the Newspaper Preservation Act, 28 C.F.R. § 48 (1988), state in pertinent part:

> *Section 48.10 Hearings*: (a) Upon the issuance by the Attorney General of an order for a hearing, the Assistant Attorney General for Administration shall appoint an administrative law judge in accordance with section 11 of the Administrative Procedure Act, 5 U.S.C. 3105. The administrative law judge shall:
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> * * *
>
> (4) Conduct a hearing in accordance with section 7 of the Administrative Procedure Act, 5 U.S.C. 556. At such hearing, the burden of proving that the proposed arrangement meets the requirements of the Newspaper Preservation Act will be on the proponents of the arrangement.

STATEMENT

1. On May 9, 1986, respondents Detroit Free Press (the "Free Press") and The Detroit News (the "News") filed an application with the respondent Attorney General for approval of a joint operating arrangement ("JOA") pursuant to the Newspaper Preservation Act (the "NPA" or the "Act"), 15 U.S.C. §§ 1801, *et seq*. Detroit is the nation's fifth largest newspaper market. The Free Press, the nation's eighth largest newspaper, is Detroit's dominant daily morning newspaper, and the News, the nation's seventh largest paper, is the city's only afternoon daily newspaper. Pet. App. 7a, 14a.

The NPA authorizes the Attorney General to grant an antitrust exemption to newspapers that seek to operate under a joint operating arrangement. 15 U.S.C. § 1803(b). However, the Act limits the exemption to situations where one of the newspapers can demonstrate that it is a "failing newspaper," which the Act defines as a "newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. §§ 1802(5) & 1803(b). The application identified the Free Press as the "failing newspaper" for purposes of the NPA. Pet. App. 137a.

The JOA at issue here provides that the Detroit market would be divided between the two newspapers for the next 100 years, with the Free Press publishing the morning newspaper and the News publishing the afternoon newspaper. Under the JOA, the papers would form a partnership known as "The Detroit News Agency," which would make all commercial decisions for both papers, including setting their sales prices and advertising rates. The News would receive 55% of the profits during the first year, but that percentage would decrease until the sixth year, after which the profits would be evenly divided. Pet. App. 173a.

In accordance with the Department of Justice's regulations, 28 C.F.R. § 48.7 (1988), the application was referred to then-

Assistant Attorney General for Antitrust Douglas H. Ginsburg, who concluded in a 70-page report that the applicants had not carried their burden of establishing that the Free Press was a failing newspaper. As support for this conclusion, he pointed out that there is a serious question as to why the News is "willing to share 50% of the profits of the JOA with the Free Press (after the first five years) if, as the parties assert, 'the inescapable conclusion [is] that the financial losses of the Free Press will continue indefinitely [absent a JOA]'?" Report of the Assistant Attorney General (July 23, 1986), pp. 66-67 (brackets in original). However, to give the applicants another opportunity to prove their case, Assistant Attorney General Ginsburg recommended that Attorney General Edwin Meese III appoint an administrative law judge to hear evidence. *Id.* at 70.[1]

2. On February 25, 1987, Attorney General Meese referred the application to Administrative Law Judge ("ALJ") Morton Needelman, who presided over a three-week evidentiary hearing, at which 16 witnesses testified, and at which a number of parties, including the Justice Department's Antitrust Division, opposed the JOA. Pet. App. 1a. On December 29, 1987, Judge Needelman issued a 129-page recommended decision in which he made numerous findings of fact and concluded that the JOA should be denied. *Id.* Although Attorney General Meese ultimately approved the JOA, he expressly "accept[ed] as accurate the fact findings of the Administrative Law Judge." Pet. App. 147a.[2]

The fundamental issue before the ALJ was whether the Free

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[1]The Assistant Attorney General's Report is reprinted at pages 424-509 of the joint appendix that was filed in the court of appeals ("Joint Appendix"), a copy of which has been lodged with the Clerk of this Court.

[2]The Antitrust Division's Post-Hearing Brief opposing the JOA appears at pages 510-39 of the Joint Appendix.

Press was in "probable danger of financial failure." In order to resolve this question, the ALJ had to determine why the Free Press had been losing money and whether it would continue to do so if the JOA were denied. Based on the evidence in the record, Judge Needelman made a number of critical factual findings on these issues.

First, he found that Detroit could support two profitable newspapers, and thus that the Free Press's financial troubles were not due to any inherent weakness in the relevant market. Pet. App. 95a.

Second, he agreed with the Antitrust Division that during the 10 years prior to filing their JOA application, the two papers had been essentially competitive equals. Pet. App. 31a, 32a-85a. Thus, although in 1960 the News had had a "substantial lead (183,751) over the Free Press in daily circulation," by 1976 "the daily circulation battle ha[d] been fought to a virtual tie," and between 1976 and 1986 "the Free Press's share of total daily circulation never fell below 49%." Pet. App. 40a. While the News led in advertising, the Free Press was dominant in the morning market and had other clear advantages over the News. Pet. App. 31a-39a, 106a-108a. The profit split, which the ALJ concluded would be "essentially . . . 50/50" (Pet. App. 122a), is especially relevant because it strongly suggests, as the Antitrust Division had argued, that both papers had concluded that they were at competitive parity.

Moreover, as the ALJ found, only two months prior to the time that the JOA was signed, one of the expert witnesses for the applicants, newspaper analyst John W. Morton, "was of the view that if the Detroit newspaper war was to continue the News was 'at greater risk' than the Free Press." Pet. App. 112a. "Morton saw a ten-year trend favoring the Free Press and he emphasized that because of its strong morning franchise it was positioned to avoid the downward spiral and overtake the News." *Id.* According to the ALJ, "as late as June 1986 [a month *after* the

application for a JOA had been filed, David] Lawrence, the Free Press's publisher, was planning for an expansion 'regardless of the outcome of the JOA.'" Pet. App. 104a n.242.

Third, the ALJ found that the Free Press had lost approximately $10 million per year since 1980, but that the News had lost almost as much, and that the reason for these losses was that the papers' circulation and advertising prices were probably the lowest in the country for major daily newspapers. Pet. App. 70a, 76a, 82a, 84a; *see also* Panel Opinion at Pet. App. 172a. For example, the daily price of the News is 15 cents, whereas the Free Press charges 20 cents. Pet. App. 172a. In Judge Needelman's words, "Detroit cannot sustain two profitable papers when both are practically being given away." Pet. App. 122a.

Fourth, the ALJ discussed the motivation for the low prices. He found that in 1981, after the papers had suffered their first year or two of losses in many years, the Chief Executive Officers of Knight-Ridder, Inc., which owned the Free Press, and the Evening News Association, which then owned the News, had met and "emphasized that one or both newspapers needed to continue to show losses in order to qualify for a JOA, and that with a few more years of such losses the prospects of a JOA would be 'ironclad.'" Pet. App. 19a. The ALJ also found that the Free Press subsequently adopted a marketing strategy with the objective of "achiev[ing] profitability through total market dominance . . ., and if that should fail, to force the News to accept a JOA on the Free Press's terms." Pet. App. 21a. Moreover, before purchasing the News in 1986, Gannett Company contacted Knight-Ridder "to determine if [it] was still interested in forming a JOA." Pet. App. 29a.

Fifth, the ALJ addressed the issue of whether the News was likely to raise its prices if the JOA were denied, which the News would have to do to return to profitability. This issue was critical because the ALJ found, and the Attorney General agreed, that a price rise by the News would enable the Free Press to become

immediately profitable, eliminating any justification for a JOA. Pet. App. 95a-100a, 122a, 143a. On this critical issue, the ALJ found that the applicants had not met their burden of proving that the News was likely to continue to keep its prices low (and thereby to lose money indefinitely), and that instead the evidence demonstrated that the papers might raise their prices if the JOA were denied. Pet. App. 92a, 132a; *see also* 28 C.F.R. § 48.10(a)(4) (1988) (burden of proving all pertinent issues on the proponents of the JOA).

Sixth, the ALJ evaluated the testimony of Knight-Ridder's CEO that he would recommend closing the Free Press if the JOA were disapproved. According to the ALJ, "[t]he record . . . contains no convincing evidence that he seriously considered closing the Free Press prior to his witness stand bolt out of the blue and accordingly I have assigned little weight to this threat." Pet. App. 104a. To support his conclusion, he noted that "[t]here are no contemporaneous documents indicating that this recommendation had been pressed before the Knight-Ridder Board; on the contrary, the record shows that the Knight-Ridder Board has approved costly Free Press expansions and the newspaper's executives have been proceeding on the assumption that the Free Press would not be closed even if the JOA were to be denied." Pet. App. 104a.[3]

3. On August 8, 1988, Attorney General Edwin Meese III rejected the recommendations of the ALJ and the Antitrust

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[3]After the ALJ issued his decision, the newspapers and the six unions that had opposed the JOA before the ALJ executed an agreement whereby the union employees were given bonuses and certain guarantees in exchange for withdrawing from the administrative proceedings. Joint Appendix, pp. 657, 661-62. Although the unions have taken no position in this litigation, many employees of the two newspapers continue to oppose the JOA. *See infra* p. 10 n. 4.

Division and approved the application. He made no additional factual findings and expressly stated that he accepted the fact findings of the ALJ. Pet. App. 147a. In his opinion, the Attorney General acknowledged that this application was unlike any JOA that the Department had ever evaluated. Pet. App. 139a. In each of the four prior JOA applications that had been considered since Congress adopted the NPA in 1970, one paper had been dominant and profitable, whereas the "failing" paper had not been profitable for a number of years, but instead was in a classic "downward spiral," where circulation and advertising were declining, generally in increasing amounts each year. Pet. App. 141a.

In order to approve the JOA, the Attorney General had to construe the term "probable danger of financial failure" to apply in a market where both newspapers were competitively equal and had been losing roughly equal amounts of money due to a price war. He purported to follow the construction of the Act that the Ninth Circuit adopted in *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983) (*"Hearst"*), under which the applicants were required to show that the Free Press was "suffering losses which more than likely cannot be reversed." Pet. App. 142a, 144a. The Ninth Circuit, however, had applied this test to a newspaper that was on a downward spiral in a market where its competitor was clearly dominant and profitable (704 F.2d at 471, 479), whereas in the case of Detroit the Free Press was *not* on a downward spiral and the News was not clearly dominant. *See supra* pp.6-7. Furthermore, even though both the Antitrust Division (Joint Appendix, p. 449) and the *Hearst* court had concluded that the NPA should be interpreted narrowly in light of the rule that exemptions from the antitrust laws must be narrowly construed, the Attorney General nowhere stated that he took that rule into consideration.

In concluding that the JOA should be granted, Attorney

General Meese acknowledged that both papers could become profitable if circulation and advertising prices were increased, but he pointed out that the Free Press could not increase its prices unless the News did the same. Pet. App. 143a. Relying on testimony of Gannett officials that the News would not raise prices even if the JOA were denied, the Attorney General concluded that it was "probable" that the Free Press would continue to suffer losses if he declined to approve the JOA. Pet. App. 144a. On that basis, Attorney General Meese granted the application.

4. Petitioners filed this case in the United States District Court for the District of Columbia on August 16, 1988.[4] The defendants below and respondents here are the Attorney General of the United States, the Free Press, and the News. On August 17, 1988, District Judge Joyce Hens Green stayed the Attorney General's order, but thereafter Judge George H. Revercomb ruled against petitioners on the merits. Relying on *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), Judge Revercomb concluded that the courts were required to "grant considerable deference" to the Attorney General's interpretation of the NPA. Pet. App. 155a. On that basis, he held that the Free Press could qualify as a "failing" newspaper by demonstrating that it had suffered losses for a number of years and had "no unilateral

[4]Petitioners are Michigan Citizens for an Independent Press ("Michigan Citizens"), Public Citizen, and six individuals. Michigan Citizens has over 500 members, including approximately 200 employees of either the News or the Free Press, more than 300 readers, and 13 advertisers of one or both papers. The individual petitioners represent the same range of interests as Michigan Citizens. Public Citizen is a national consumer organization which brought this action on behalf of its members in the Detroit area, as well as its members nationwide who would be adversely affected if the JOA in this case were approved.

way out" of its loss position (since the Free Press could not raise its prices if the News decided to maintain its unprofitably low prices). Pet. App. 156a, 157a-58a.

A divided panel of the United States Court of Appeals for the District of Columbia Circuit affirmed. The central holding of Judge Laurence Silberman's majority opinion was that, in view of this Court's decision in *Chevron*, the Attorney General was not required to apply the rule of statutory construction that exemptions from the antitrust laws are to be narrowly construed. Pet. App. 177a-78a, 179a-80a. On this question, the panel majority held that, under *Chevron*, the courts are required to defer to the Attorney General's construction, even if that construction is in conflict with a recognized rule of statutory interpretation. Having resolved the legal issue in the Attorney General's favor, the panel then sustained the Attorney General's decision, relying principally on the losses that both papers had suffered and the fact that a price increase by the Free Press, which is its key to profitability, was dependent on a price increase by the News.

Judge Ruth B. Ginsburg dissented. Pet. App. 191a. In her view, both the Attorney General and the courts are required to apply the rule that the antitrust exemptions must be narrowly construed, even after *Chevron*. Pet. App. 195a-96a. If the NPA were properly construed, she reasoned, the Attorney General's decision could not be sustained. In particular, Judge Ginsburg relied on: the contrary position of both the Antitrust Division and the ALJ (Pet. App. 191a-92a & n.3, 194a n.5); the "concession that both newspapers, by their own projections, 'could achieve profitability with price increases and the elimination of discounting' [of advertising]" (Pet. App. 196a, *quoting* Attorney General's Decision at Pet. App. 140a); and the "burden of proof which JOA applicants bear" (Pet. App. 196a). Judge Ginsburg concluded that the case should have been remanded to "give the Attorney General an opportunity to state more comprehensively

why the JOA route is ripe for his approbation now." *Id.*

The court of appeals denied rehearing *en banc* by a vote of 5-4. Chief Judge Wald, in an opinion joined by Judges Mikva and Edwards, dissented on the ground that the predicate for the Attorney General's decision — that if the JOA were denied, the News would not raise its prices, causing the Free Press to continue to lose money — made "no economic sense" because such a course of action would mean that the News would also continue to suffer deep losses. Pet. App. 205a. In response, the panel majority filed an opinion emphasizing that its decision was required by "*Chevron*'s restraining leash." Pet. App. 200a.[5]

Petitioners then applied to this Court for a continuance of the stays that had been entered by the district court and the court of appeals. Chief Justice Rehnquist initially denied the application, but on March 4, 1989, Justice Brennan granted it. However, on March 20, 1989, the Court issued an order vacating the stay, with a notation that Justices Blackmun and Stevens would have granted the application. Although the Free Press had opposed the application in this Court, as it did in the courts below, the newspapers announced on March 21, 1989, that they would not implement the JOA while this Court considers this petition.

REASONS FOR GRANTING THE PETITION

For the first time in the 19 year history of the Newspaper Preservation Act, the Attorney General has approved a joint operating arrangement where the losses that the papers have suffered are the product of vigorous competition, intended to achieve either dominance (which had proved to be an elusive goal for both papers), or the enormous monopoly profits that

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[5]Judges Starr and D. H. Ginsburg did not participate. Judge Ruth B. Ginsburg voted to grant rehearing, but did not join Chief Judge Wald's opinion.

accompany a JOA. Unlike every application that preceded this one, the JOA at issue here does not involve one paper that is dominant and profitable, and a second paper that is both not profitable and losing ground in circulation and advertising. To the contrary, it is not disputed that both papers could quickly be restored to profitability through modest price increases — increases which would bring circulation prices and advertising rates in line with virtually all other papers in the country.

Moreover, the Attorney General's construction of the Newspaper Preservation Act, which the court below upheld, threatens the independence of the papers in the 25 cities that have competing dailies, since it provides a roadmap for profitable papers to obtain a JOA, and the monopoly profits that can be obtained in a non-competitive market. That decision would also expand the *Chevron* rule of deference to the point where agencies would be free to ignore rules of construction that have long guided courts, Congress, and administrative agencies. Finally, the decision would have a substantial impact on other antitrust laws that are implemented by federal agencies, since those agencies would be free to adopt an expansive construction of antitrust exemptions, and the courts would be barred by the panel's expansive reading of *Chevron* from correcting all but the most egregious interpretations.

I. The Decision Below Improperly Extends *Chevron* and Will Have a Broad Impact on Antitrust Laws That Are Enforced by Administrative Agencies.

The panel held that this Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council, supra,* excused the Attorney General from applying the rule that exemptions from the antitrust laws must be narrowly construed and required the court to defer to his approach to statutory interpretation. That rule is a firmly embedded one, *see, e.g., Group Life & Health*

Insurance Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979), which this Court has reaffirmed since the *Chevron* decision. *Square D v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 421 (1986) ("exemptions from the antitrust laws are to be strictly construed and strongly disfavored"); *see also, e.g., Niagara Frontier Tariff Bureau, Inc. v. United States*, 826 F.2d 1186, 1190-91 (2d Cir. 1987) (court's review of agency action guided by both the rule applicable to antitrust exemptions and by *Chevron*). No court had previously suggested that an administrative agency or a court has the authority to ignore it under *Chevron* or any other rationale.

Even the panel recognized both that the Attorney General's interpretation of the statute was a significant departure from past interpretations of the NPA and that his construction of the Act would have been impermissible if he had been required to adhere to the antitrust rule of statutory construction. Pet. App. 180a. Furthermore, in *Committee for an Independent P-I v. Hearst Corp., supra*, the Ninth Circuit expressly held that the rule of statutory construction limited the Attorney General's discretion. Thus, the panel decision below is in conflict with the only other circuit court decision interpreting the NPA.

Although *Hearst* predated *Chevron*, the Ninth Circuit applied a standard very similar to the one adopted in *Chevron*. It held that courts must defer to an "administrative construction of a statute" if the agency's construction is "reasonable . . . and consistent with the intent of Congress." 704 F.2d at 473. However, in the very next sentence of its opinion, the court emphasized that both it and the Attorney General must be "guided by an additional rule developed out of the court's recognition of the fundamental importance of the antitrust laws — exemptions to the antitrust laws are to be narrowly construed." *Id., citing Group Life and Health Ins. Co. v. Royal Drug Co., supra.*

Despite these decisions, the panel in this case held that "*Chevron* implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable *agency* interpretations of ambiguous statutes." Pet. App. 180a (emphasis in original). The panel's opinion not only jeopardizes the proper implementation of the NPA, but it also could have a major impact on other antitrust laws that are interpreted by administrative agencies. For example, when the Federal Maritime Commission held, under section 15 of the Shipping Act of 1916, 46 U.S.C. § 814, that a contract involving the purchase of one shipping company by another was an "agreement" within the meaning of that Act, and thus subject to the FMC's approval and grant of antitrust immunity, this Court disagreed, even though "the statutory language neither clearly embraces nor clearly excludes discrete merger or acquisition-of-assets agreements." *Federal Maritime Commission v. Seatrain*, 411 U.S. 726, 731 (1973). According to the Court, a ruling sustaining the Commission's "broad reading of [the statute] would conflict with our frequently expressed view that exemptions from the antitrust laws are strictly construed." *Id.* at 733.

The panel's analysis is flatly inconsistent with *Seatrain*. Indeed, applying the panel's method of statutory construction would have led to the opposite result in *Seatrain* since this Court relied on the antitrust canon to reverse the Commission's expansive construction of the Shipping Act. The seriousness of the panel's misapplication of *Chevron* is underscored by this Court's citation to the *Seatrain* decision in *Chevron*, for the proposition that the courts must continue to use "traditional tools of statutory construction" in determining whether an agency's construction of a statute is "contrary to clear congressional intent." 467 U.S. at 843 n.9.

The panel's decision also conflicts with this Court's construction of the Bank Merger Act. Under that Act, the Comptroller of the Currency has the authority to approve mergers after weighing their "anticompetitive effects" against the "probable effect of the transaction in meeting the convenience and needs of the commu-

nity." 12 U.S.C. § 1828(c)(5)(B). Although the Comptroller initially decides whether to approve the merger, "it is the court's judgment, not the Comptroller's, that finally determines whether the merger is legal." *United States v. First City National Bank*, 386 U.S. 361, 369 (1967). In *First City National Bank*, this Court stressed that:

> Traditionally in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure.

Id. at 367. This principle, which is directly at odds with the majority decision below, also applies to antitrust issues that other agencies are entrusted with deciding under other antitrust statutes. *See, e.g.*, Federal Trade Commission Act, 15 U.S.C. § 45 (Federal Trade Commission may prohibit "unfair methods of competition"); Fishers Coop Marketing Act, 15 U.S.C. §§ 521, 522 (Secretary of Commerce may order associations to "cease and desist" if he finds that the "association monopolizes or restrains trade . . . to such an extent that the price of any aquatic product is unduly enhanced"); Export Trading Company Act, 15 U.S.C. §§ 4001, *et seq.* (Secretary of Commerce may exempt persons in export trade from antitrust laws upon showing that there will be no "substantial lessening of competition" and no "unfair methods of competition"); Federal Aviation Act, 49 U.S.C. §§ 1378, 1382 (Department of Transportation may approve certain airline mergers and pooling agreements unless they substantially lessen or eliminate competition, in which case applicants must also demonstrate that the arrangement is necessary to meet significant transportation needs of the public); Interstate Commerce Act, 49 U.S.C. §§ 11343, 11344 (ICC may approve certain acquisitions and mergers taking into account

"effect on the adequacy of transportation" and possible "adverse effect[s] in competition"). The panel's approach to statutory interpretation is also at odds with this Court's post-*Chevron* construction of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, in *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986), where it held that, although the FTC is entitled to "some deference," "identification of governing legal standards and their application to the facts found [are] for the courts to resolve."

Moreover, the implications of the panel's decision extend beyond the antitrust laws, since it also permits administrative agencies to disregard other firmly established rules of statutory construction. By dismissing such rules, the panel eliminated a key tool that the courts have historically used to evaluate the reasonableness of an agency's statutory interpretation, a tool that this Court has also frequently employed in reviewing agency decisions, even after *Chevron*. *See, e.g., Bowen v. American Hospital Association*, 476 U.S. 610, 644 n.33 (1986) (reference to the rule of strict construction of statutes in derogation of sovereignty); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 555 (1987) (reference to "familiar rule of statutory construction that doubtful expressions must be resolved in favor of Indians," although rule not applicable in that case); *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (reference to "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien," although it was unnecessary to rely on the rule in reversing the agency); *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986) ("where possible, provisions of a statute should be read so as not to create a conflict"); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) ("identical words used in different parts of the same act are intended to have the same meaning").

Insofar as we have been able to determine, this Court has never

suggested that *Chevron* modifies these traditional rules of statutory construction, let alone one that is as important as the rule at issue here.

II. The Attorney General's Interpretation Emasculates the Newspaper Preservation Act and Jeopardizes the Independence of Newspapers in 25 Cities.

In *Citizen Publishing Company v. United States*, 394 U.S. 131 (1969), this Court held that joint operating arrangements violate the price-fixing and monopolization restrictions in the Sherman Act and the prohibition against anti-competitive mergers in the Clayton Act, unless one of the newspapers can demonstrate that it is a "failing company." Congress passed the Newspaper Preservation Act both to resolve the uncertainty created by *Citizen Publishing* about the validity of the 22 JOAs then in existence, and to define the standard applicable to future JOAs.

The NPA adopted two very different standards for JOAs, depending on whether the agreement was executed before or after July 24, 1970, the effective date of the new law. Recognizing that a demanding standard might pose a hardship for newspapers that had been operating under a JOA for many years, Congress provided that pre-enactment JOAs would be exempt if, at the time the agreement was executed, one of the parties to the agreement was not "likely to remain or become a financially sound publication." 15 U.S.C. § 1803(a).

Initially, the Senate proposed that this standard govern post-enactment JOAs as well. S. 1520, 91st Cong., 2d Sess. § 3(5) (1969). However, Congress ultimately adopted a significantly more rigorous standard for future JOAs, which requires prior approval by the Attorney General and which authorizes a JOA only if one of the papers is a "failing newspaper." The Act defines that term as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial

failure," and it permits the Attorney General to approve a JOA only if the arrangement furthers "the policy and purpose" of the Act. 15 U.S.C. §§ 1802(5) & 1803(b). Congress intended this to be a "tougher" and "much more stringent standard" than the "not likely to remain or become financially sound" standard which applied to pre-1970 JOAs. 116 Cong. Rec. 23154-55 (1970) (remarks of Congressman Railsback); *see also* H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. 10 (1970) (standard applicable to pre-1970 JOAs "less strict" than standard applicable to post-1970 JOAs).

In the legislative history of the NPA, Congress emphasized that the "probable danger of financial failure" standard is to be read in light of this Court's decision in *United States v. Third National Bank*, 390 U.S. 171 (1968) ("*Third National Bank*"). S. Rep. No. 91-535, 91st Cong., 1st Sess. 2 (1969); 116 Cong. Rec. 23,146 (1970) (Congressman Kastenmeier). That decision interprets the provisions of the Bank Merger Act of 1966, under which a similar exemption from the antitrust laws is available. Congress's reference to the Bank Merger Act is significant because in *Third National Bank* this Court had held that Congress had required banks to "reliably establish the unavailability of alternative solutions to the woes" of the bank in order to obtain the exemption. 390 U.S. at 190. Indeed, the Court's opinion suggests that, unless the difficulties faced by the bank were "insoluble," or close to insoluble, the merger must be rejected. *Id.* at 190-91.

Thus, the structure of the NPA, its legislative history, and even the Justice Department's regulations, under which the applicants have the burden of proof on all issues, 28 C.F.R. § 48.10(a),(4)(1988), demonstrate that Congress intended to impose a rigorous test for papers seeking an antitrust exemption after 1970. Yet even the panel seemed to acknowledge that the Attorney General adopted an extremely expansive interpretation of the Act (Pet. App. 177a-78a, 180a, 182a, 200a), which, if

permitted to stand, will make it significantly easier for other newspapers to obtain JOAs in the future.

In her dissent from the denial of rehearing *en banc*, Chief Judge Wald emphasized that the Attorney General's decision depended completely on his prediction "that even in the absence of a JOA or any possibility thereof, the News will continue to price below costs, sustaining significant losses itself [in order to drive] the Free Press from Detroit." Pet. App. 205a. Yet, as she also observed, this prediction "makes no economic sense in light of the factual findings that [the Attorney General] himself accepted as true," particularly the finding that Detroit "can support *two profitable newspapers* if, in the words of Free Press management, 'competitive pricing becomes rational and consistent with other markets around the country.'" Pet. App. 205a, *quoting* Free Press management, *cited in* ALJ Recommended Decision at Pet. App. 96a (emphasis in original).

Not only is the Attorney General's interpretation of the NPA legally and factually insupportable, but it has profound implications for other newspapers. If left standing, it would permit any organization with adequate resources to sustain losses for several years to obtain approval of a JOA (and thereby gain monopoly profits) in any competitive market, even one that previously had two profitable newspapers. This could be accomplished by lowering circulation and advertising prices to incite a price war, as long as officials from the "non-failing" paper were willing to testify that they will not raise prices even if the JOA is denied.[6]

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[6]The possibility of a newspaper being forced into a JOA is not idle speculation. As described in the *amicus curiae* brief filed in the court of appeals by Little Rock Newspapers, Inc. (publisher of the *Arkansas Democrat*), Gannett, the owner of The Detroit News, has cut prices and thereby transformed the *Arkansas Gazette*, which it also owns and which competes with the *Democrat*, from a profitable newspaper into one that is losing

Such a strategy would cause the second newspaper to lower its prices in order to maintain circulation and advertising. Under the Attorney General's interpretation of the NPA, the second newspaper would then be "failing" because it would be losing money and would have no unilateral way out of its loss position. Attorney General's Decision and Order at Pet. App. 141a, 142a-44a; Panel Opinion at Pet. App. 176a, 177a, 184a-86a.

The only requirement that would be the least bit difficult to satisfy would be demonstrating that the "non-failing" paper would maintain its low prices, and continue to lose money, even if the JOA were denied. However, under the Attorney General's decision, the applicants could meet their burden of proof on this issue through testimony of officials from the "non-failing" paper. Pet. App. 144a-76a. Ultimately, of course, both newspapers would have to agree to operate under a JOA, but they would have an enormous financial incentive to do so, since, in Judge Ginsburg's words, a JOA is a "large pot of gold," which offers profits that far exceed those that either paper could make in a competitive market. Pet. App. 195a.

Under this approach, it was irrelevant to the panel and to the Attorney General that neither the News nor the Free Press was dominant, and that the Free Press was not in a "downward spiral," in which a newspaper's decline in circulation and advertising feed each other, eventually becoming irreversible, and causing the paper to fail. That pattern had been found in every other JOA approved by the Department of Justice, and, as even

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approximately $10 million per year, the same amount that the "failing" Free Press is losing here. On August 14, 1988, six days after the Attorney General approved the Detroit JOA, but before this case had been filed, Gannett increased the pressure on the *Democrat* by further cutting the *Gazette's* circulation price, this time by 57. 5%. *Amicus Curiae* Brief at Add. 2-3.

the Attorney General acknowledged here, dominance and downward spiral were "the 'frame of reference [Congress] essentially embraced'" in adopting the NPA. Dissent from Panel Opinion at Pet. App. 197a (brackets in original), *quoting* Attorney General's Decision at Pet. App. 146a. Instead, the Attorney General interpreted the "probable danger of financial standard" so loosely that it is indistinguishable from the not "likely to remain or become financially sound" standard that Congress intended to limit to JOAs that were in existence when it adopted the NPA. Dissent from Panel Opinion at 194a-95a.

As Chief Judge Wald pointed out, the Attorney General's finding that the News is not likely to raise its prices even if the JOA is denied amounts to a finding that the News will engage in predatory pricing, which runs counter to "[c]lassic economic principles and basic antitrust law." Pet. App. 207a-208a, *citing Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) ("predatory pricing schemes are rarely tried, and even more rarely successful"). This finding also highlights the expansive nature of the Attorney General's construction of the NPA, particularly since his interpretation would reward them with a JOA for conduct that the Act itself excludes from the exemption. 15 U.S.C. § 1803(c) (Act not to "be construed to exempt from any antitrust law any predatory pricing").

In his memorandum in opposition to petitioners' motion for a stay, Attorney General Thornburgh argued (at 2-3) that petitioners have overstated the ease with which future applicants may obtain a JOA, claiming that Attorney General Meese in fact gave weight to eight different considerations in approving the JOA at issue here. However, five of the factors cited in the opposition (nos. 1, 2, 3, 4 and 7) are all variations on the contentions that the Free Press has sustained losses for many years, that the Free Press could not raise its prices unless the News did the same, and that the papers have been competing for a number of years. All

these factors are subsumed within petitioners' central argument that, under the Attorney General's decision, a newspaper may obtain a JOA simply by demonstrating that it has sustained several years of losses and that it cannot unilaterally raise its prices. *See supra* pp. 6-7, 9-11, 12, 20-22.

The Attorney General also argued (no. 5) that the News "enjoys a significant competitive advantage in advertising and circulation," although he did not reconcile this assertion with the panel majority's finding that the daily circulation of the two papers was within one percentage point. Pet. App. 140a; *see supra* p. 6. The findings of both the Antitrust Division and the ALJ (which the Attorney General adopted in full) demonstrate that, even taking the News's advantages into account, the two papers were essentially competitive equals. In other words, the News's lead in advertising and its slight lead in circulation may not be viewed in isolation, but instead must be evaluated in the context of the Free Press's advantages, including its dominance in the critical morning market. *See supra* pp. 6-7.

The Attorney General's sixth and eighth arguments are that it is relevant that "the corporate parent of *The Detroit Free Press* will close the newspaper if a JOA is denied" and that "neither improper marketing practices nor mismanagement caused the poor financial condition of *The Detroit Free Press*." Opposition, p. 2. Respondent overstates his sixth argument since Attorney General Meese only said that this self-serving testimony from the Chief Executive Officer of Knight-Ridder could not be "wholly disregarded," while the ALJ found that it was not credible. Pet. App. 104a-105a, 144a; *see supra* p.8. Although a finding of improper marketing practices or mismanagement might have been a sufficient basis for denying the application, their absence certainly is not a justification for granting it.

Finally, in an effort to defend his construction of the NPA against the charge that it will provide profitable papers with a guide to obtaining a JOA, the Attorney General argued that he would have the authority to disapprove a JOA application where

the "newspapers had deliberately created losses as a means of obtaining a JOA." Opposition, p. 3. The problem with this limitation is that it is highly improbable that a JOA will ever be the *exclusive* goal of competing newspapers. Instead, as even the panel majority recognized, the concern about the Attorney General's interpretation of the NPA is that "[n]ewspapers in two newspaper towns will compete recklessly because of a recognition that the loser will be *assured* a soft landing," namely a JOA. Pet. App. 189a (emphasis added).

* * *

Although Congress adopted the NPA in order to preserve as many "editorially and reportorially independent and competitive" newspapers as possible, 15 U.S.C. § 1801, the Attorney General's decision "will, ironically, make it even *more* probable that newspapers will disappear than if the Act had never been passed in the first place." Dissent from Denial of Rehearing *En Banc* at Pet. App. 210a (emphasis in original). Thus, the "giant stride the Attorney General has taken" (Pet. App. 197a) is a guide to any deep-pocket organization seeking monopoly profits in the newspaper business and will jeopardize independent newspapers in 25 cities.

The Newspaper Preservation Act is an important statute which this Court has not previously interpreted. No case is likely to present the issues more sharply than they are presented here, and the decision below is likely to be interpreted as definitive unless this Court accepts review. In Judge Ginsburg's words, this is "an important and unprecedented case" (Pet. App. 191a), and it raises issues of exceptional importance warranting the issuance of a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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